

BRB No. 98-0574 BLA

VERNON FLEMING)
)
 Claimant-Petitioner))
)
 v.)
)
 PEABODY COAL COMPANY) DATE ISSUED: _____
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS'))
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Vernon Fleming, Pound, Virginia, *pro se*.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order (97-BLA-1326) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).

¹Ron Carson, Benefits Counselor, Stone Mountain Health Services, St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's Decision and Order. In a letter dated January 22, 1998, the Board stated that claimant would be considered to be representing himself on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order.)

The administrative law judge credited claimant with twenty-one years and eleven months of coal mine employment per the parties' stipulation. Considering the claim on its merits under 20 C.F.R. Part 718, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202. Accordingly, benefits were denied. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in response to claimant's appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled by the disease. 20 C.F.R. §§718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

We affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to meet his burden to establish the existence of pneumoconiosis under Section 718.202(a). Considering the x-ray evidence under Section 718.202(a)(1), the administrative law judge properly accorded greater weight to Dr. Navani's negative reading of the February 13, 1996 x-ray over Dr. Sundaram's positive reading, based on Dr. Navani's superior credentials as a Board-certified radiologist and B reader. *Staton v. Norfolk & Western Ry Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). The administrative law judge noted that Dr. Sundaram's x-ray interpretation was the sole positive x-ray reading of record, Director's Exhibit 21, and that the most recent x-ray was read as negative by two B readers, Employer's Exhibits 3, 4. *Id.* The administrative law judge thus concluded, within his discretion, that the preponderance of the x-ray evidence does not establish the existence of pneumoconiosis at Section 718.202(a)(1). *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

The administrative law judge also correctly noted that the record contains no autopsy or biopsy evidence, 20 C.F.R. §718.202(a)(2). Further, claimant cannot establish the existence of pneumoconiosis by any of the presumptions referred to in Section 718.202(a)(3) as there is no evidence that claimant has complicated

pneumoconiosis and the instant living miner's claim was filed after January 1, 1982. See 20 C.F.R. §§718.304-306.

Considering the totality of the medical opinions under Section 718.202(a)(4), the administrative law judge, within his discretion, found that Dr. Fino's conclusion that claimant did not have pneumoconiosis was the most probative and persuasive of record. Specifically, the administrative law judge noted that Dr. Fino reviewed almost all of the medical evidence and had "one of the most complete pictures of Mr. Fleming's condition," Administrative Law Judge's Decision and Order at 15. *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Accordingly, the administrative law judge properly found that on the whole, Dr. Fino's assessment was the best documented and most well reasoned medical opinion, *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and that the preponderance of the medical opinions, including the reports of Drs. Fino, Paranthaman, and Dahhan, did not support a finding that claimant has pneumoconiosis. The administrative law judge thus properly determined, on the merits of the claim,² that claimant failed to carry his burden of proof to establish that he has pneumoconiosis or any lung disease caused by coal mine employment, an

²The administrative law judge acknowledged claimant's request for modification of the district director's denial of benefits. The administrative law judge did not, however, make an initial finding on modification under 20 C.F.R. §725.310. Any error in the administrative law judge's treatment of the instant case is harmless in light of his *de novo* consideration of the entire record on the merits of the claim. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

essential element of entitlement. 20 C.F.R. §§718.201, 718.202; *Ondecko, supra*. We, therefore, affirm the administrative law judge's denial of benefits in the instant case. *Trent, supra; Perry, supra*.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge